

3-23-09

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
BEVERLY E. HAMILTON,)	CASE NO. 07-68258 - MHM
)	
Debtor.)	

ORDER DENYING MOTION TO REOPEN

This case commenced May 29, 2007. Debtor's discharge was entered and the case was closed November 7, 2007. On March 9, 2009, Debtor, who is proceeding *pro se*, filed a motion to reopen to file a complaint to determine the dischargeability of her student loans.

The bankruptcy court has exclusive jurisdiction to determine the dischargeability of certain debts resulting from false financial statements, fraud, embezzlement, larceny or willful and malicious injury by a debtor. 11 U.S.C. §523(c). State courts have concurrent jurisdiction to determine the dischargeability of other potentially nondischargeable debts, including debts arising from educational loans. *Cummings v. Cummings*, 244 F. 3d 1263 (11th Cir. 2001); *Eden v. Robert A Chapski, Ltd.*, 405 F. 3d 582 (7th Cir. 2005).

The Bankruptcy Code, 11 U.S.C. § 523(a)(8), provides that a Chapter 7 discharge does not discharge a debtor from a debt

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for –

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified educational loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual[.]

The three prong test for undue hardship for discharge of student loan requires Debtor to show that (1) Debtor's current financial situation does not allow him to repay student loans and also maintain a minimum standard of living; (2) that Debtor's financial position *will persist for a significant portion of the repayment period*; and (3) that Debtor has made a good faith effort to repay the loans through employment, maximizing income, and minimizing expenses. (Emphasis supplied.) *In re Dennehy*, 201 B.R. 1008 (Bankr. N.D. Fla. 1997), relying upon *Brunner v. New York State Higher Education Services Corp*, 46 B.R. 752 (S.D. N.Y. 1985), *aff'd* 831 F. 2d 395 (2d Cir. 1987). The mere current inability to pay is insufficient to support a finding of undue hardship. Factors to consider:

- Serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement
- The debtor's obligations to care for dependents.
- Lack of, or severely limited, education
- Poor quality of education

- Lack of usable or marketable job skills
- Underemployment
- Maximized income potential in the chosen education field, and no other more lucrative job skills.
- Limited number of years remaining in work life to allow payment of the loan
- Age or other factors that prevent retraining or relocation as a means for payment of the loan
- Lack of assets, whether or not exempt, that could be used to pay the loan
- Potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's income
- Lack of better financial options elsewhere

Nys v. Educational Credit Management Corp., 308 B.R. 436 (9th Cir. BAP 2004).

The burden of proof to show that an educational loan is dischargeable due to undue hardship is very heavy, as Congress has made its intention clear that educational loans should be discharged only under exceptional circumstances. Plaintiff's allegations in the complaint attached to the motion to reopen are insufficient to set forth a *prima facie* case of dischargeability under 11 U.S.C. §523(a)(8). Therefore, as the bankruptcy court is not the exclusive venue for Debtor to assert a claim under §523(a)(8), and as Debtor has failed to allege a *prima facie* case of dischargeability, it is hereby

ORDERED that Debtor's motion to reopen is ***denied***.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order
upon Debtor, the Chapter 7 Trustee, and all creditors and parties in interest.

IT IS SO ORDERED, this the 20th day of March, 2009.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE